(2)

No. 88-2043

IN THE

Supreme Court of the United States

October Term, 1988

GERALD L. BALILES, *et al.*,

Petitioners,

v.

THE VIRGINIA HOSPITAL ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether health care providers have a private right under 42 U.S.C. § 1983 to enforce provisions of the Medicaid Act requiring reasonable and adequate payment for provider services.

2. Whether the *Ex Parte Young* rule applies to this suit for prospective declaratory and injunctive relief against state officials.

3. Whether the state statute of limitations on 42 U.S.C. § 1983 actions bars this suit against state officials for a continuing violation of federal law in enacting, enforcing, and implementing the Medicaid Reimbursement System and Appeals System.

4. Whether *Burford* abstention should stay federal court review of the Virginia Medicaid Program's noncompliance with federal law requirements.

Pursuant to the requirements of Rule 28.1 of the United States Supreme Court, the affiliates of the Virginia Hospital Association ("VHA") are as follows:

Virginia Hospital Shared Services Corporation
Virginia Hospital Research and Education Foundation
Virginia Hospital Employee Benefits Trust

The VHA has no parent corporation or subsidiaries.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Virginia Hospital Association ("the VHA"), appellee below, hereby submits its brief in opposition to the Petition for Writ of Certiorari filed in this Court. The petition, filed by the state officials ("the defendants") in this case, seeks review of the decision

of the United States Court of Appeals for the Fourth Circuit on four issues.

I.

OPINIONS BELOW

The VHA adopts the appendix designations used by the defendants for the relevant opinions and orders entered below. The defendants' Memorandum in Support of the Commonwealth's Motion for Stay of Further Proceedings in the United States District Court for the Eastern District of Virginia, Richmond Division, dated April 18, 1989, is set forth in Appendix E herein.

II.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the Eleventh Amendment provisions included in

defendants' petition, this case also involves the construction and application of 42 U.S.C. § 1983, which reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a state of the District of Columbia.

This case also involves the application of Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* ("the Medicaid Act"). The relevant provision of the Medicaid Act is 42 U.S.C. § 1396a(a)(13)(A), which reads in its entirety as follows:

A state plan for medical assistance must --
provide for payment (except where the State agency is subject to an order under section 1914) of the hospital, skilled nursing facility, and intermediate care facility services provided under the plan through the use of rates (determined in accordance with methods and standards developed by the State) and which, in the case of hospitals, take into account the situation of hospitals which serve a disproportionate number of low income patients with special needs and provide, in the case of hospital patients receiving services at an inappropriate level of care (under conditions similar to those described in section 1861(v)(1)(G)), for lower reimbursement rates reflecting the level of care actually received (in a manner consistent with section 1861(v)(1)(G)) which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access (taking into account geographic location and reasonable travel time) to inpatient hospital services of adequate quality; and such State makes further assurances, satisfactory to the Secretary, for the filing of uniform cost reports by each hospital, skilled nursing facility, and

intermediate care facility and periodic audits by the State of such reports.

III.

STATEMENT OF THE CASE

The VHA adopts by reference the statement of the case in the Opinion of the United States Court of Appeals for the Fourth Circuit, dated February 22, 1989, reported at 868 F.2d 653 and also set forth in Appendix A, to defendants' petition.

IV.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The United States District Court for the Eastern District of Virginia, Richmond Division assumed jurisdiction of this matter pursuant to 28 U.S.C. §§ 1331 and 1343. App. at D-2.

V.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

INTRODUCTION

The defendants have presented four questions[1] in their petition for writ of certiorari, concerning whether health care providers have an enforceable right, actionable under 42 U.S.C. § 1983, to reasonable and adequate payment for services rendered in accordance with the

[1]In addition to these issues, the defendants raised below jurisdictional questions concerning the *stare decisis* effect of a prior decision in the District Court and concerning the associational standing of the VHA to assert the rights of its member hospitals. App. at A-5. The Court of Appeals held that the action should not be dismissed based on *stare decisis* and that the VHA did not lack standing. App. at A-12, 13, 14, 15. While the defendants continue to argue these issues in the body of their petition, they have not raised them as questions presented for review and therefore they are not before the Court. Rule 21.1(a), Rules of United States Supreme Court.

requirements of the federal Medicaid statute, whether the defendants are immune from suit under the Eleventh Amendment, whether the action was brought within the applicable statute of limitations and whether the District Court should have abstained from deciding the case. The petition for certiorari should be denied because the Court of Appeals adhered to precedent established by this Court in correctly deciding each of these issues. The Fourth Circuit's opinion is not in conflict with any decision of this Court, nor with any decision of another federal court of appeals on the same matters, nor with a decision of the court of last resort of any state.

Furthermore, the defendants are asking the Court to review an

interlocutory decree of the Court of Appeals. The Court exercises its certiorari jurisdiction sparingly. Nothing about this case is so extraordinary that the Court should abandon its normal practice of denying certiorari when there is no final judgment in the case. An exercise of the Court's discretionary power to review at this point would be premature. Both the District Court and the Fourth Circuit (App. at A-12,14,15) noted that development of the facts at trial would shed light on several of the jurisdictional issues argued by the defendants and evidenced a willingness to revisit these issues if necessary. The VHA believes that the development of a factual record would aid the Court in reviewing the issues raised in the

petition should review be sought after trial.

Finally, following the Court of Appeals decision, the defendants suggested to the District Court in their Memorandum in Support of the Commonwealth's Motion for Stay of Further Proceedings, set out in Appendix E herein, that the state's current study of Medicaid reimbursement rates might well render the litigation moot. Because only prospective relief was requested in this case, there is no need for the Court to grant certiorari when the defendants envision that the litigation may be mooted by their own actions before the case could be heard.

A.

HEALTH CARE PROVIDERS HAVE AN ENFORCEABLE RIGHT TO PAYMENT AT A REASONABLE AND ADEQUATE RATE UNDER THE MEDICAID ACT.

The federal circuit courts of appeal that have considered the question whether health care providers have an implied right of action to enforce the provision of the Medicaid Act have uniformly held that such a right exists. In holding that providers have a right of action pursuant to 42 U.S.C. § 1396a(a)(13)(A), the Fourth Circuit came to the same conclusion previously reached by the Tenth and Ninth Circuits. *Colorado Health Care Ass'n v. Colorado Dep't of Social Servs.*, 842 F.2d 1158, 1164 n.5 (10th Cir. 1988); *Coos Bay Care Center v.*

Oregon Dep't of Human Servs., 803 F.2d 1060 (9th Cir. 1986), *cert. granted* 107 S. Ct. 1970, *vacated as moot*, 108 S. Ct. 52 (1987). The Tenth Circuit has just recently reaffirmed its earlier ruling that § 1396a(a)(13)(A) creates enforceable rights on behalf of health care providers. *Amisub, Inc. v. Colorado Dep't of Social Servs.*, No. 88-2482, slip op. at 9-11 (10th Cir. July 11, 1989). *See also Nebraska Health Care Ass'n v. Dunning*, 778 F.2d 1291 (8th Cir. 1985) (providers have enforceable rights under the Medicaid Act).

This Court held in *Maine v. Thiboutot*, 448 U.S. 1 (1980) that federal statutes may imply rights actionable under 42 U.S.C. § 1983. The Court of Appeals applied the criteria identified in *Middlesex City Sewerage Authority v.*

National Sea Clammers Association, 453 U.S. 1, 13 (1981) and *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89 (1981) in determining that 42 U.S.C. § 1396a(a)(13)(A) creates such an enforceable right on behalf of health care providers. The Court of Appeals analyzed the language of the statute and its legislative history in reaching its conclusion that Congress intended that providers have a private cause of action under the Medicaid Act. App. at A-7, 8, 9, 10. *See* H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 962, *reprinted in* 1981 U.S. Code Cong. & Admin. News 1010, 1324; S. Rep. No. 139, 97th Cong., 1st Sess. 478, *reprinted in* 1981 U.S. Code Cong. & Admin. News 396, 744.

The purpose of the Medicaid Act is, of course, to provide medical services to

financially needy persons. Congress determined that in order to accomplish this purpose, providers must be paid rates which are "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities." 42 U.S.C. § 1396 a(a)(13)(A). It was never intended that payment for medical services be made directly to Medicaid recipients. Thus, Medicaid providers are the intended and necessary beneficiaries of the payment provisions of the Medicaid Act. Evidently, the defendants are suggesting that, contrary to the express provisions of § 1396a(a)(13)(A), they can pay providers at a rate which is unreasonable and inadequate to meet the costs incurred by efficiently and economically operated

hospitals without being subject to suit for prospective relief under § 1983.

The Court of Appeals also correctly applied the precedents of this Court in determining that Congress did not intend to foreclose a § 1983 remedy for hospital providers. The Medicaid Act does not provide for a private judicial remedy which might otherwise supplant the § 1983 remedy. App. at A-11. Nor is the administrative oversight accorded to the Health Care Financing Administration so comprehensive an enforcement mechanism that it evidences Congressional intent to foreclose a § 1983 remedy. App. at A-10, 11. *See Wright v. City of Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 427-28 (1987). In addition, the Court of Appeals observed that this Court's decision in *Patsy v. Board of*

Regents, 457 U.S. 496, 507-12 (1986) does not require exhaustion of state administrative remedies as a prerequisite to a § 1983 action. App. at A-10.

In short, the Fourth Circuit properly applied the standards enunciated in recent decisions of this Court in determining that the Medicaid Act confers an implied right of action on providers and that no Congressional intent is evident to foreclose this private remedy. This holding accords with the law established by every other federal court of appeals which has considered the question.

B.

THE FOURTH CIRCUIT PROPERLY APPLIED THIS COURT'S *EX PARTE YOUNG* DECISION IN THIS CASE.

The Court of Appeals correctly applied this Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908) and its progeny to the VHA's claims against state officials[2] for violations of federal law. App. at A-13. By seeking only prospective declaratory and injunctive relief requiring those officials to

[2]The defendants state that the Commonwealth of Virginia has not waived its Eleventh Amendment immunity to Medicaid Act claims in federal court. The instant suit, however, seeks relief against state officials. As noted by this Court last term, the state's immunity is not relevant to the prospective relief sought against officials in such actions. *See Will v. Michigan Department of State Police*, 57 U.S.L.W. 4677, 4680 n.10 (1989)(citing *Ex Parte Young*, 209 U.S. 123, 159-60 (1908) and *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)).

conform their future conduct to federal law,[3] the VHA's suit falls within the exception to the state's Eleventh Amendment immunity which this Court first recognized in *Ex Parte Young* and has continued to recognize in recent rulings. *See, e.g., Papasan v. Allain*, 478 U.S. 265 (1986); *Green v. Mansour*, 474 U.S. 64 (1985).

[3]Defendants claim that the District Court's decision in *Mary Washington Hospital v. Fisher*, 635 F. Supp. 891 (E.D. Va. 1985) and HCFA's "approval" of the Reimbursement System and Appeals System somehow insulates their actions and makes them consistent with federal law. The Court of Appeals, however, both considered and rejected the bases for this argument. App. at A-12, 13 (rejecting defendants' claim to *stare decisis* protection from suit based on the factual claims addressed in *Mary Washington Hospital v. Fisher*; App. at A-8 n.4 (finding, following an extensive statutory and regulatory analysis, that the Secretary of HHS (and therefore HCFA as a subordinate agency) "is not required to consider the reasonableness of Medicaid reimbursement rates paid by the defendants to VHA hospitals, only the adequacy of state assurances.")

Furthermore, the Court has stated that the Eleventh Amendment does not bar relief designed to stop continuing violations of federal law even if there will be a substantial ancillary impact on the state treasury. *See Papasan v. Allain*, 478 U.S. at 282. As this Court noted in *Green*, a case seeking declaratory relief for a past violation of federal law, "the availability of prospective relief of the sort awarded in *Ex Parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." 474 U.S. at 68 (*citing Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 102 (1984)). Defendants' continuing violation of

federal law is a federal concern subject to prospective relief. Based on defendants' theory, their actions, no matter how egregious, would be shielded from federal court scrutiny.[4]

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[4]Defendants' claim to "good faith immunity" for their actions completely lacks merit. This issue was neither pleaded, argued, nor briefed below and should not be heard on interlocutory appeal as a matter of law. *Miree v. DeKalb County*, 433 U.S. 25, 34 (1977). The defendants' alleged good faith presents a factual issue which has not been addressed by the lower court and cannot be properly assessed in the absence of factual findings by the District Court. Even if the defense was properly presented, the defendants' sole authority that this Court should apply good faith immunity in this case is completely inapposite. In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court found that the Attorney General of the United States had qualified immunity to suits brought by the victims of federal wiretapping for actions taken prior to a change in the wiretapping laws. Unlike the instant case, there was no continuing violation of law. Most importantly, *Mitchell v. Forsyth* presented a damages claim, not a claim for injunctive relief. Good faith immunity has no application where damages are not at issue. *Cf. Maria Santiago v. Corp. de Renovacion Urbana y Vivienda*, 554 F.2d 1210 (1st Cir. 1977).

C.

THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE STATUTE OF LIMITATIONS DOES NOT BAR THIS SUIT.

The Court of Appeals ruled that VHA allegations of a continuing violation of federal law were not time barred. App. at A-15, 16. This ruling involved a straightforward application of this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). The VHA has alleged that, in "enacting, enforcing and implementing" the Virginia Medicaid Program, the defendants have violated, and continue to violate, federal law. The Court of Appeals found that a challenge to the continued operation of an unconstitutional Medicaid program cannot be barred by any statute of

limitations. App. at A-15. The defendants offer no authority to the contrary.

In an effort to create a statute of limitations question, the defendants argue that the VHA's claims are somehow time barred based on the *stare decisis* effect[5] of *Mary Washington Hospital v. Fisher*, 635 F. Supp. 891 (E.D. Va. 1985), petition at 12, n. 9, and the VHA's alleged lack of sufficient interest in the outcome of the litigation to meet

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[5]The Court of Appeals properly found the District Court decision in *Mary Washington Hospital v. Fisher* to be sufficiently fact-specific and the holdings therein sufficiently distinct from what would be dispositive in this case to deny defendants' motion for summary judgment. App. at A-12. In fact, the District Court's decision in *Mary Washington Hospital* recognized that future developments might take the Virginia Medicaid Program out of compliance with federal law. App. at A-13 (citing *Mary Washington Hospital*, 635 F. Supp. at 901). Those developments have occurred.

this Court's test for associational standing to raise the claims of its members.[6] Petition at 12, n.10. *Cf. Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Coles v. Harris Realty Corp.*, 633 F.2d 384 (4th Cir. 1980), *modified sub nom. Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). The court below addressed both

[6]The defendants have sought to distinguish the applicable limitations period in the instant case from this Court's earlier decision in *Brown v. Board of Education* by asserting that the VHA "can bring this action only as a facial challenge." Petition at 12. This assertion ignores both the terms of the VHA's Amended Complaint and the Court of Appeals' ruling on associational standing. The only case cited by the defendants, *Randall v. Lukhard*, 709 F.2d 257 (4th Cir. 1983), relevant holdings adopted on rehearing *en banc*, 729 F. 2d 966 (4th Cir.), *cert. denied*, 469 U.S. 872 (1984), was properly distinguished by the Fourth Circuit. App. at A-16, n.12. *Randall* involved a single historical act (denial of Medicaid eligibility), unlike the instant case which involves continuing federal law violations adversely affecting reimbursement to hospitals participating in the Medicaid system.

issues and rejected them. App. at A-12, 13, 14. Moreover, these issues were not raised in the petition as questions presented and are not properly before the Court. Rule 21.1(a), Rules of the United States Supreme Court.

D.

ABSTENTION IS WHOLLY INAPPROPRIATE AND INAPPLICABLE, GIVEN THE FACTS OF THIS CASE.

The defendants do not present any important or undecided federal abstention issue which merits review by this Court. The sole basis for defendants' abstention argument is that they have allegedly established a comprehensive regulatory framework which would be disrupted by federal court review. Petition at 14-15.

However, the Virginia Medicaid Program rules do not provide an opportunity for review of the VHA claims. As the Court of Appeals found, App. at A-12, n.9 and A-17, 18, the relief sought by the VHA is simply not available through the administrative process established by defendants.[7]

The defendants' reliance on the abstention doctrine of *Burford v. Sun Oil Company*, 319 U.S. 315 (1943) is misplaced. The *Burford* plaintiffs, through diversity jurisdiction, sought federal court review of a Texas Railroad Commission order which uniformly regulated oil and gas field drilling in

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[7] *Cf. Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627 (1986) (cited by defendants) (finding abstention appropriate where a plaintiff would have a full and fair opportunity to litigate a constitutional claim).

Texas. The VHA's systemic challenge to defendants' failure in this federal question case to comply with applicable federal law in the development and implementation of the Virginia Medicaid Program is simply not analogous to the individualized state property law dispute at issue in *Burford*. Here, there is no risk of an inconsistent application of state law, as the law which controls the resolution of this matter is federal[8] and the relief requested would benefit all providers.[9] *Cf. Bath Memorial Hosp. v.*

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[8] While state participation in the Medicaid Program is voluntary, once a state elects to participate, it must comply with applicable federal law and regulations. *Harris v. McRae*, 448 U.S. 297 (1980).

[9] Defendants' exhaustion claim relating to the use of the existing Appeals System, petition at 15, has nothing to do with abstention. Moreover, it is disingenuous. The VHA members' "failure to prosecute any appeals filed under the Appeal System" is a direct result of an agreement between the parties to the case. The Court of

Maine Health Care Finance Comm'n, 853 F.2d 1007 (1st Cir. 1988) (declining to follow *Burford* abstention in a challenge to the state hospital rate setting methodology).

Defendants' final argument relating to ripeness is not properly presented before this Court in defendants' petition. Rule 21.1(a), Rules of the United States Supreme Court. However, even if it were stated as a question presented to the Court, the Court of Appeals' finding that the case is ripe for review is consistent with this Court's decisions in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and *Toilet Goods Association, Inc. v.*

Appeals below referred to defendants' claim during oral argument on this issue as ungracious", and it remains so here.

Gardner, 387 U.S. 158 (1967). Based on the facts now present in the record, the Court of Appeals found nothing speculative about the VHA's claims. The actions challenged are essentially legal products of final agency action, and delay in reviewing these actions produces

significant hardship to VHA members.[10] App. at A-16, 17.

[10]Defendants' reliance on *Wilmac Corp. v. Bowen*, 811 F.2d 809 (3d Cir. 1987) is also misplaced. In *Wilmac*, the Third Circuit found the provider's claim to be premature because the disputed regulation in *Wilmac* did not compel or penalize any current conduct by the provider. *Id.* at 813. Wilmac incurred the injury only if it decided to construct an addition to its facility and if it decided to accept Medicaid patients there. *Id.* By contrast, VHA providers currently incur harm from defendants' failure to pay rates which comply with 42 U.S.C. § 1396a(a)(13)(A). Such injuries are neither speculative nor subject to full recovery through postponement of judicial review, due in part to the Eleventh Amendment bar from obtaining any prejudgment monetary benefit from the equitable relief sought. Moreover, such injuries cannot be avoided due to the legal obligations of a majority of VHA members to treat Medicaid recipients based on a hospital's past participation in the Hill-Burton Program. *See* 42 U.S.C. § 291 *et seq.* Additionally, all VHA members are now required to treat Medicaid recipients that come to the hospital in emergency conditions or active labor. *See* 42 U.S.C.A § 1395dd (1986). Accordingly, the VHA members' participation in the Virginia Medicaid Program can hardly be described as "voluntary". Petition at 6, n.3.

VI.

CONCLUSION

The Court of Appeals and District Court below have properly construed the applicable precedents of this Court and correctly found that the VHA has an enforceable right under 42 U.S.C. § 1983 to assert its claims, that the prospective relief sought against state officials falls within the *Ex Parte Young* exception to Eleventh Amendment immunity, that the state officials cannot use the state statute of limitations as a shield for their continuing violations of federal law, and that the instant case presents a matter of federal concern appropriately considered in federal court. The defendants' petition does not offer any conflicting Court or circuit

court precedent, nor does it demonstrate any important question of federal law that merits resolution by this Court on interlocutory appeal.

WHEREFORE defendants' petition for a writ of certiorari should be denied.

Respectfully submitted,

THE VIRGINIA HOSPITAL ASSOCIATION

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

THE VIRGINIA HOSPITAL ASSOCIATION,

Plaintiff,

v.

CIVIL ACTION
NO. 86-0166-R

GERALD L. BALILES, et al.,

Defendants.

MEMORANDUM IN SUPPORT OF THE COMMONWEALTH'S MOTION FOR STAY OF FURTHER PROCEEDINGS

The Commonwealth has moved this Court to stay further proceedings in this matter. The principal reasons for this motion are: (1) The Commonwealth is in the process of seeking a writ of certiorari from the United States Supreme

Court to review the affirmance by the United States Court of Appeals for the Fourth Circuit of this Court's rulings on eight jurisdictional issues; and (2) the fact that the Commonwealth's ongoing process of review of Medicaid reimbursement rates may well render this proceeding moot.

BACKGROUND

In 1986, the Virginia Hospital Association ("VHA") filed this action to challenge the provisions of the Commonwealth's State Plan for Medical Assistance relating to the reimbursement of hospitals for treatment of Medicaid patients. Since these provisions had been previously challenged and upheld by this Court, in Mary Washington Hospital v. Fisher, 635 F. Supp. 891 (E.D. Va.

1985), this Court dismissed the case on grounds of collateral estoppel. The Fourth Circuit reversed. Virginia Hospital Association v. Baliles, 830 F.2d 1308 (1987).

On remand, the Commonwealth moved for summary judgment on eight jurisdictional issues. This Court denied that motion, but stayed further proceedings on May 4, 1988 and on May 18, 1988 certified those issues for interlocutory appeal. The Fourth Circuit granted that appeal on July 27, 1988 and on February 22, 1989 affirmed this Court's ruling. It denied a rehearing on March 22, 1989 and denied a stay to the Commonwealth's pending application for a writ of certiorari on March 29, 1989.

I.

A STAY OF FURTHER PROCEEDINGS IS APPROPRIATE TO AVOID WASTING THE TIME AND RESOURCES OF THIS COURT AND OF THE PARTIES IN PROCEEDING WITH POTENTIALLY UNNECESSARY DISCOVERY AND TRIAL

The eight preliminary issues decided by this Court and the Fourth Circuit are all jurisdictional in nature. They include the right of a provider or its association to litigate against a Medicaid Program pursuant to 42 U.S.C. §1983, the standing of the VHA to bring this action, the bar of the Eleventh Amendment, the bar of the statute of limitations, the lack of ripeness of this case, the fact that this Court should have abstained, and the correct application of the doctrine of stare decisis.

For reasons previously briefed in this Court and in the Fourth Circuit and not repeated here in detail, it is clear that the issues raised by the Commonwealth are significant jurisdictional questions arising under both the Constitution and the Medicaid Act (Title XIX of the Social Security Act). They raise important points that need to be resolved with finality in order to guide the conduct of the Commonwealth and other states in this and other similar litigation in the federal court system.[1] The significance of this litigation is reinforced by the fact that

[1]The Supreme Court has already granted a writ of certiorari on one of the issues herein - the right of a Medicaid provider to sue under §1983 - but the case was not decided on the merits. *See, Coos Bay Care Center v. Oregon*, 803 F.2d 1060 (9th Cir. 1986), *cert granted*, 107 S.Ct. 1970, *vacated as moot*, 108 S.Ct. 52 (1987).

27 states either signed or endorsed an amicus brief filed in the Fourth Circuit in support of the Commonwealth.

Moreover, if any one of these issues is heard and decided by the United States Supreme Court in favor of the Commonwealth, the result will be to end or substantially reduce the scope of this litigation in this Court. Should a stay not be granted, the parties must now prepare for an extended period of discovery and trial, along with possible future appeals.

In order to avoid such an expensive, time-consuming and potentially superfluous use of resources, this Court should grant this Motion. If the United States Supreme Court does grant a writ of certiorari, a continued stay will be essential. If it does not, since this

litigation has already been extended for a period of over three years, the modest amount of additional time that may expire in the interim will have little impact on the eventual outcome.

II.
IMPENDING REVISION OF THE COMMONWEALTH'S REIMBURSEMENT PROCESS MAY RENDER THIS LITIGATION MOOT, IN WHOLE OR IN PART

Although the Commonwealth has always had in place an ongoing process of review of Medicaid reimbursement, as a result of direction by the 1988 General Assembly, the Department of Medical Assistance Services has commissioned and now has in progress an independent study by a contract consultant to review the current system and recommend improvements and changes.

The consultant has been directed to

examine the hospital reimbursement system and its resultant reimbursement rates as a first priority. Accordingly, within the next few months, this major study with its recommendations will be delivered to the Commonwealth and will be made available to all Medicaid providers and to the public, including VHA. Public procedures will take place over the balance of 1989 with the result that the Department of Medical Assistance Services will, as directed by the General Assembly, make its recommendations to the 1990 session of the legislature for whatever revisions may appear appropriate.

While there are no guarantees to VHA concerning the recommendations that may be made or the action that may be taken, one thing is certain. Within the next

few months, it is entirely possible that this process will moot, in whole or in part, any controversy between the parties to this litigation. If this case proceeds precipitously to trial, the Court, if it found VHA's allegations to have any merit, could find itself ordering the Commonwealth to do that which it has already done or is currently doing.[2] Since VHA has maintained in both this Court and the Fourth Circuit that it does not seek retroactive relief - in fact it seeks only prospective relief - it would appear prudent for the Court to stay further proceedings until it is determined whether or not any ongoing

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[2]If, in fact, this Court were to conclude that the current system required review and revision, such re-review would only serve to further delay the implementation of any potential changes.

controversy will remain after the Commonwealth's study is released and the General Assembly has acted on it.

CONCLUSION

WHEREFORE, if this matter is not stayed, the Court will of necessity be required to hear a complex and time-consuming suit. In the meantime, the Supreme Court may grant a writ of certiorari and reverse any one of the jurisdictional issues. In addition, intervening events may moot this case in whole or in part. As a result, the Commonwealth respectfully requests the Court to grant this Motion and to issue a stay of further proceedings herein.

Respectfully submitted,

_____

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